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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROY NEAL SHELTON, Defendant and Appellant.	H033587 (Monterey County Super. Ct. No. SS002210)

I. STATEMENT OF THE CASE

On May 21, 2007, the Monterey County District Attorney filed a petition to commit defendant Roy Neal Shelton as a sexually violent predator (SVP) under the SVP Act. (Welf. & Inst. Code, § 6600 et seq.)[1] On October 21, 2008, a jury found the allegations in the petition true, and the court ordered defendant committed to the custody of the Department of Mental Health (DMH) for an indeterminate term.

On appeal from the commitment order, defendant claims the delay in commencing the SVP trial denied him due process of law. He claims the court erred in admitting the testimony of a psychologist concerning the Sexual Offender Commitment Program. Last, he claims the SVP Act, as amended in 2006 and applied to him, violates his constitutional

[1] All unspecified statutory references are to the Welfare and Institutions Code.

rights to equal protection and due process and also the constitutional protections against ex post facto legislation and double jeopardy.

We agree that the pretrial delay violated defendant's constitutional right to procedural due process and reverse the order of commitment.

II. THE EVIDENCE

Defendant testified that as a child he was shunned by other children because of facial scars. When he was five or six, his 15-year-old sister, who was his best friend, molested him. When he was eight, he and a 17-year-old boy masturbated together.

In 1964, when he was around 16 years old, he molested a seven-year-old girl whom he was babysitting. As a result, he was required to attend psychotherapy for three months. In 1992, when he was 28 years old and involved in a heterosexual relationship, he digitally penetrated a nine-year-old boy in his camper. After the boy reported the incident, defendant and his girlfriend fled to Arkansas, with the help of his mother he "hid out" there for around 10 months before being arrested. He later pleaded guilty to two counts of anal digital penetration, for which he was sentenced to eight years in prison.[2] He was eventually released on parole, but in 1998, he moved in with a woman who had two children, in violation of a parole condition that required him to stay away from children, and he was returned to prison for eight months.

After his release, he met a family that included two boys aged seven and 11 while on a camping trip. He befriended the family and gained the boys' trust by buying them toys and playing games with them. During subsequent camping trips with the family, he molested both boys, digitally penetrating the younger boy more than once and fondling the older boy's genitals. Defendant pleaded guilty to molesting both and was sent to prison again.

[2] Despite his plea, defendant denied penetrating the boy's anus, claiming that he only rubbed it.

While in prison defendant began to realize the error of his ways and voluntarily participated in numerous rehabilitative programs. One program taught him how to deal with his past offenses and avoid their repetition. Another dealt with anger management. Another focused on drugs, parental abuse, child abuse, alcohol abuse, sexual abuse, and relationships with children. A psychodrama course taught defendant empathy for victims. Another class dealt with denial and keeping secrets. Other programs focused on how to resolve problems, establish appropriate boundaries in relationships with children, and understand how crimes impact not only victims but also their parents, families, peers, and jurors.

Defendant also attended a peer counseling group for molesters for over three years, during which he discovered the Relapse Prevention Workbook for Adults, which was written by psychologist Charleen Steen, Ph.D. It teaches techniques for preventing future criminal conduct, including understanding behavior and chains of misconduct and avoiding the decisions that lead to them. On his own initiative, he completed all of the assignments in the workbook.

Defendant testified that he was no longer sexually attracted to children and was not in denial about being a pedophile. However, he considered it necessary to continue therapy to maintain the lessons he had learned in the relapse prevention programs. He intended to avoid a relapse by creating an environment not attractive to children. He intended to go to a clinic in Santa Clara that dealt with sexual offenders and had spoken to Stewart Nixon, Ph.D., its director, about avoiding contact with children and having his brother or sister or others act as an accountability partner when, for example, he went to the store.[3] Defendant also had been accepted by a support group akin to alcoholics anonymous that dealt with sexual issues.

[3] Defendant admitted that his brother was with him on the camping trip during which he molested the two boys, knew that defendant had been to prison for child

Psychologists Michael Selby, Ph.D.; Dawn Starr, Ph.D.; and Shona Sreenivasan, Ph.D., were appointed to evaluate defendant before his scheduled release from prison on parole.

All three agreed that defendant suffered from a diagnosed mental disorder: pedophilia. Selby and Starr opined that defendant was likely to reoffend if released from custody. Both used the Static 99, an actuarial test, and defendant's scores reflected a 40 to 50 percent risk of reoffense within the next 15 years. Selby noted numerous dynamic factors to support his opinion, including defendant's denial that he was attracted to children; his desire or need to relate to children because of his own troubled childhood, his lack of genuine remorse or empathy, and his use of inappropriate sexual behavior to reduce stress. Selby explained that pedophilia was a life-long affliction, for which the only treatment was to develop coping mechanisms. Selby testified that in a less restrictive environment, defendant's denial would allow him to be in situations where he would reoffend.

Starr testified that despite defendant's extensive participation in programs and self-guided treatment while in prison, he posed a substantial risk of reoffending. Among the factors that made his release a risk to others were that he offended even after receiving some therapy; he failed to comply with a probation condition designed to protect children from him; he minimized his past conduct; and he had no network of people to hold him accountable. Starr diagnosed defendant with alcohol and cannabis dependence, which were related risk factors. She testified that she had no reason to think defendant would follow up on treatment. Starr also opined that defendant exhibited both emotional and volitional impairment and had personality and interpersonal problems that predisposed him to act out sexually deviant urges and commit predatory sexual acts. Moreover, given his long history, she did not consider his denial of a sexual interest in

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molestation, knew that defendant was not supposed to be around children, but had not done anything at that time to hold him accountable.

children to be credible. She acknowledged that defendant desired to change, but she did not think that desire was enough to eliminate the risk he posed, and she believed he needed further treatment before he was ready for release into the community.

Although defendant suffered from pedophilia and had high-risk Static 99 scores, Sreenivasan did not find that he was likely to reoffend if released. Although he was still at risk of doing so, he recognized the perversity of his criminal conduct, had good insight, had begun to identify ways to control himself, and felt better for doing so. In support of her view, she found that defendant had made a substantial and meaningful effort to seek treatment. She noted his completion of Steen's workbook, which she found similar to the sex-offender program in the state hospital. She also found that he had realistic plans for housing, employment, and further treatment in the community.

Jesus Padilla, Ph.D., a psychologist, was chairman of the team that created the SVP treatment program in state hospitals, which, he explained, is a five-phase voluntary cognitive behavioral and relapse-prevention program designed to teach SVPs how to manage their thoughts and behavior. Each SVP's treatment is overseen by a team that included a psychiatrist, psychologist, a social worker, and a nurse. The program phases involve group discussions overseen by trained staff as well as personal work, such as writing an autobiography.

Concerning the Steen workbook, which defendant had completed in prison, Padilla opined that it represented, essentially, a "paired-down version" of the state program and not an adequate alternative program. The workbook itself, he noted, acknowledges that it is not a comprehensive stand-alone program but should be used as an adjunct to concurrent group or individual therapy. Padilla asserted that without concurrent therapy with an unbiased, independent professional, the individual is not being evaluated, and therefore it is difficult to know whether the individual has made any real progress.

Charleen Steen testified for the defense. Based on historical information, Steen agreed that defendant suffered from pedophilia but opined that it was dormant. She

disagreed with the analyses and conclusions of Selby and Starr. She outlined defendant's participation in numerous and varied programs while in prison, which she considered remarkable and unique; his writings; the results of numerous tests that she administered; her interview with him and the understanding, changes, remorse, and empathy he manifested; and numerous low risk factors, such as defendant's age, his lack of sexual preoccupation or entitlement, his personal hygiene, the lack of an antisocial lifestyle, and his conscientious prison record. In all, she opined that defendant was not likely to reoffend if released.

Concerning her workbook, Steen said that its purpose was to assist therapists in helping individuals work through the various steps of relapse prevention. The workbook was not a substitute for a therapeutic treatment program; rather, it was designed to reinforce the concepts learned in treatment. She noted, however, that defendant did not have a therapist available to him in prison.

A second defense psychologist, Robert Halon, Ph.D., opined that defendant did not suffer from a mental disorder as required by the SVP Act; rather he had a personality structure that lent itself to seeking sexual gratification with children. Moreover, defendant's personality structure did not impair his volitional control or thinking. According to Halon, defendant knew at all times what he was doing with the children he molested and chose to do so. On the other hand, evidence that defendant had fantasies and urges to have sex with children did support a professional diagnosis of pedophilia. Halon also questioned the use of Static 99 and other actuarial tests to gauge the likelihood that someone would reoffend.

Stewart Nixon, Ph.D., a psychologist, developed a program to deal with sex offenders that integrated cognitive talk therapy with other tools, such as polygraphs, penile plethysmographs, and olfactory counter-conditioning that helped measure and dispel sexual arousal and prevent relapse. Nixon met with defendant to determined that he was very motivated to participate in the program and was a good candidate.

Patricia McAndrews, M.A., a psychotherapist for sex offenders, worked with Nixon in the same office, where they ran the voluntary sex offender treatment program. The program used methods such as relapse prevention behavior chains that were similar to those used in state institution programs.

III. PRETRIAL DELAY

Defendant contends that the pre-delay in commencing the SVP trial violated his right to procedural due process.

Background

Defendant was originally scheduled for release on parole on April 27, 2007, but that date was extended to June 11 to permit a complete psychological evaluation. (See § 6601.3 [authorizing extension of custody].) On May 21, 2007, the district attorney filed the commitment petition. After a hearing on June 8, the court found the petition facially sufficient to warrant a probable cause hearing. (See § 6601.5.) That hearing was held over five months later on November 26, at which time the court found probable cause. At a hearing on December 14, the court set April 21, 2008, as the trial date. (See § 6602.)

On April 18, the defense filed its trial brief and revealed for the first time its intent to call Nixon as an expert witnesses. On April 21, the prosecutor objected to the late discovery and moved to exclude Nixon's testimony as a sanction. The trial court denied the motion and instead granted a continuance of trial due to late discovery. Trial was rescheduled for June 2.

On May 28, Judge Duncan, to whom the case had been assigned, informed the parties that he was currently trying another case. The prosecutor sought a continuance; defense counsel requested reassignment to another judge because the parties and their witnesses appeared ready to proceed. Judge Duncan referred the decision to the presiding judge.

On May 30, defense counsel asked the presiding judge to reassign the case. He argued that defendant's fundamental interest in liberty mandated that he be tried within a

meaningful period of time and that Judge Duncan's unavailability was not a sufficient reason to delay the trial and prolong defendant's pretrial custody.

The presiding judge opined that reassignment for trial on June 2 was not an option because all courts were currently occupied with criminal trials and "[w]e don't have any resources available for a jury trial on Monday, at least the way things are set up right now." Noting that the witnesses were currently available, defense counsel asked that the case trail all the other matters so that if a court opened up, the trial could begin. The presiding judge opted instead to vacate the trial date and send the parties back to Judge Duncan for a hearing on June 4 to reschedule the trial.

On June 4, defense counsel informed Judge Duncan that the defense experts would not be available again until around August 25. The prosecutor represented that her witnesses would be available that day, and Judge Duncan set trial for August 25. However, on June 11, the prosecutor informed the court that she had misspoken about her witnesses' availability. She had not heard from her most important witness and later learned the he was not available from August 23 to September 10. Consequently, the prosecutor asked that trial be rescheduled. Defense counsel said his experts could be available earlier on August 11 and asked that trial be advanced to that date. The prosecutor did not respond to that request and was not asked about that date. However, Judge Duncan said the he would be not"be here" on that date.[4] Defense counsel suggested that the case be reassigned so that trial could commence on August 11. Counsel again asserted that defendant had a right to be tried within a meaningful period of time. Judge Duncan said he would not set trial on a day that he would not be able to

[4] Judge Duncan explained, "As we sort of had a custom and understanding with everybody, for years, that we do not set stuff during people's vacations. If people have a vacation, they're entitled to some consideration, so—" Both defendant and the Attorney General infer that Judge Duncan was unavailable due to a vacation.

conduct it. Because Selby was not available in September, the court reset trial for October 6. Trial commenced on that day.

The Litmon Case

Relying on this court's decision in *People v. Litmon* (2008) 162 Cal.App.4th 383 (*Litmon*), defendant claims the 528-day delay in trying him violated his due process right to trial within a meaningful amount of time. In particular, he argues that he "was confined prior to a determination he was an SVP. Of the 528-day delay, the four-month plus delay from June 2, 2008, to October 6, 2008, was brought about by the court's refusal to assign the case to another judge. That an all purpose judge was assigned to the case cannot be a countervailing interest justifying a delay that violated constitutional due process."

We discuss *Litmon* in some detail because it shall guide our analysis in this case.

Litmon was committed as an SVP for a two-year term from May 2000 to May 2002.[5] Before that term expired, the district attorney sought an additional two-year recommitment to May 2004. In November 2003, 19 months after Litmon's initial commitment expired, the court found probable cause to recommit. In February 2004, before the trial on the recommitment petition, the district attorney filed a second petition to extend the commitment from May 2004 to May 2006. In May 2005, the court found probable cause on the second petition. In September 2005, 16 months after the recommitment term sought under the first petition had expired, the trial was held, and the jury found that Litmon was an SVP, retrospectively justifying defendant's recommitment from May 2002 to May 2004. At that time, the district attorney filed a third recommitment petition, seeking an extension to May 2008. Four months later, in January

[5] At that time, a commitment under the SVP Act was for a two-year term. However, in 2006, the Act was amended, and now a commitment is for an indeterminate term. (Stats.2006, ch. 337 (S.B.1128), § 55, eff. Sept. 20, 2006; Initiative Measure (Prop. 83, § 27, approved Nov. 7, 2006, eff. Nov. 8, 2006); *Litmon, supra*, 162 Cal.App.4th at pp. 408-409 [discussing legislative history].)

2006, the court found probable cause on that petition. Then, in February, the court consolidated the second and third petitions for trial. Thereafter, the jury could not reach a verdict, and in March, the court declared a mistrial. At that point, Litmon had been in custody for 22 months, since May 2004, without a proper determination that he was an SVP.

In April 2006, the court continued the retrial until January 2007 to accommodate the district attorney's scheduling conflicts and need to update psychological evaluations. However, in August 2006, Litmon moved to dismiss the consolidated petitions, claiming the excessive delay denied him due process. The trial court denied the motion. The court opined that there was no right to a speedy trial, and it had no authority to dismiss for excessive delay. The court further explained, "that the attorneys were 'involved and engaged in other trials that are SVPA cases and we can only do so many at a time and therefore this is the next available date . . . .' " (*Litmon, supra,* 162 Cal.App.4th at p. 393.) In January 2007, the court continued the trial again because the district attorney said that his experts were unavailable.[6] Litmon renewed his motion to dismiss, but the court denied it and continued the retrial to March 2007. (*Id*. at pp. 393-394.)

By that time, the SVP Act had been amended to change the standard term of commitment from two years to an indeterminate term. (See fn. 5, *ante*.) As a result, the

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[6] In support of its request for a continuance in January 2007, the prosecutor stated that "three of the four expert witnesses, who had been 'issued subpoenas approximately one month prior to the trial date,' were unavailable to testify and 'due diligence' had been 'exercised in an attempt to secure the presence of these experts, by not only contacting them directly, but also the respective counties and prosecutors' offices under which they were currently subpoenaed to see if the schedules of the various witnesses could be adjusted to allow their testimony in the present case.' " (*Litmon, supra,* 162 Cal.App.4th at p. 393.) In his declaration, the prosecutor stated, that, "after he had issued subpoenas for the four expert witnesses on December 4, 2006, he learned that three out of the four witnesses had already been served with multiple subpoenas, which had higher priority because they had been served earlier, and it did not appear the three experts would be released and available to testify in the trial in this case. He indicated all four witnesses would be available to testify in mid-March." (*Id*. at p. 394.)

trial court retrospectively deemed Litmon's original two-year commitment in 2000 to be an indeterminate term. This rendered the consolidated petitions for additional two-year commitments moot and a retrial on them unnecessary. (*Litmon, supra,* 162 Cal.App.4th at pp. 393-394.)

Litmon appealed, claiming the court erred in denying both of his motions to dismiss the consolidated petitions on grounds of excessive pretrial delay after the mistrial. We agreed. (*Litmon, supra,* 162 Cal.App.4th at pp. 394-395, 406.)

We first noted that under the Fourteenth Amendment, the state cannot deprive one of life, liberty, or property without due process, which generally means notice and an opportunity to be heard " ' "at a meaningful time in a meaningful manner." ' " (*Litmon, supra,* 162 Cal.App.4th at p. 395.) To determine what process a person facing involuntary SVP commitment is entitled to and whether a pretrial delay comports with due process, we employed alternative balancing tests, one derived from factors identified in *Mathews v. Eldridge* (1976) 424 U.S. 319 (*Matthews*) and *Federal Deposit Ins. Corp. v. Mallen* (1988) 486 U.S. 230 (*Mallen*); the other derived from the similar factors identified in *Barker v. Wingo* (1972) 407 U.S. 514 (*Barker*). (*Litmon, supra,* 162 Cal.App.4th at pp. 396-406.)

Under *Mathews, supra,* 424 U.S. 319, we considered (1) the importance of the interest affected by an SVP trial; (2) the risk of an erroneous deprivation of that interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interests, including the purpose of the proceeding and the potential burden of additional procedures. (*Litmon, supra,* 162 Cal.App.4th at pp. 396, 399-401.) We noted that a potential SVP has a fundamental interest in liberty, which is negated by a commitment. We noted that a postdeprivation hearing results in a loss of liberty before trial that is irretrievable regardless of the outcome. We opined that the mistrial on the consolidated recommitment petitions heightened the risk of an erroneous SVP determination. Last, we recognized that the

state had a compelling interest in confining and treating violent, disordered sex offenders and a lesser compelling pecuniary interest in conserving limited resources. (*Litmon, supra,* 162 Cal.App.4th at pp. 400-401.)

Balancing the *Mathews* factors, we concluded that procedural due process normally required a *pre*deprivation hearing, that is, a hearing *before* an SVP commitment and resulting loss of liberty. (*Litmon, supra,* 162 Cal.App.4th at p. 401.) We opined that this norm was entirely feasible because potential SVPs are identified while they are still serving their prison terms. (*Id*. at p. 402.)

Obviously, the predeprivation-hearing norm was not followed in *Litmon,* and he was held based solely on a court's initial finding of probable cause for months before he was afforded a trial on whether he was an SVP. In *Litmon,* however, we acknowledged, that in extraordinary situations, *post*deprivation hearings are tolerated where there is some valid governmental interest at stake to justify the procedure. (*Litmon, supra,* 162 Cal.App.4th at p. 395.) "Thus, 'where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause. [Citations.]" (*Id*. at pp. 395-396.) Even if initially justified, however, at some point, a postdeprivation delay in commencing a proceeding would violate due process. (*Id*. at p. 396.)

To determine whether the postdeprivation delay comported with principles of due process, we further considered the relevant factors identified in *Mallen, supra,* 486 U.S. 230: (1) the likelihood that prehearing custody based on the initial probable cause determination may have been erroneous; and (2) the state's reasons for delaying the hearing. (*Litmon, supra,* 162 Cal.App.4th at p. 398; *Mallen, supra,* 486 U.S. at p. 242.)

We focused on the period of delay following the mistrial. We noted that the hung jury not only heightened the possibility that Litmon might not be found to be an SVP but also increased the likelihood that the court's initial determination of probable cause—the

sole basis for Litmon's loss of liberty after May 2004—was erroneous. (*Litmon, supra*, 162 Cal.App.4th at pp. 402-403, 405.)

We next reviewed the reasons for the delay, which were the need for updated psychological evaluations, the difficulty in incorporating past testimony into legal strategy, and the time it takes to ensure the presence of witnesses for trial. We dismissed these reasons, finding that they reflected a " 'business as usual' approach to trial scheduling despite the ongoing deprivation of personal liberty that was occurring." (*Litmon, supra,* 162 Cal.App.4th at p. 403.) We opined that "any *chronic, systematic* post-deprivation delays in SVP cases that only the government can rectify must be factored against the People. While delays based upon the uncontrollable unavailability of a critical witness may be justifiable [citation], *post-deprivation delays due to the unwillingness or inability of the government to dedicate the resources necessary to ensure a prompt SVPA trial may be unjustifiable*. Just as 'unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn' [citation], post-deprivation, pretrial delays in SVPA proceedings cannot be *routinely* excused by *systemic problems*, such as understaffed public prosecutor or public defender offices facing heavy caseloads, underdeveloped expert witness pools, or insufficient judges or facilities to handle overcrowded trial dockets." (*Ibid*., fn. omitted, italics added.)

Given our evaluation of the *Mathews-Mallen* factors, we concluded that the two-month continuance from January to March 2007 failed to comport with the principles of procedural due process. (*Litmon, supra*, 162 Cal.App.4th at p. 404.) By January 2007, Litmon had been confined for 31 months based solely on the court's probable cause finding, which, given the mistrial, might well have been erroneous. Moreover, we found that the prosecutor's difficulty in scheduling his experts was primarily due to his own lack of diligence. (*Id*. at pp. 403-404.) Under these circumstances, the state's need for

the experts' testimony did not outweigh Litmon's fundamental interest in liberty and the harm he had already suffered and justify further delay.

We reached the same conclusion under the alternative test derived from factors identified in *Barker, supra,* 407 U.S. 514 to determine whether a pretrial delay in a criminal case violated the right to a speedy trial. Those factors include: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the resulting prejudice to the defendant from the delay. (*Litmon, supra,* 162 Cal.App.4th at pp. 398-399; *Barker, supra,* 407 U.S. at pp. 522, 533.)

We noted that the pretrial delay on the second and third recommitment petitions was extensive and created a presumption of prejudice. Again, the state's excuses for the delay were inadequate to justify the lengthy pretrial period of custody. We noted that Litmon had twice moved to dismiss the consolidated second and third recommitment petitions due to excessive delay. (*Litmon, supra,* 162 Cal.App.4th at pp. 405-406.) And last, we found the pretrial delay to be highly oppressive, especially given "the years of pretrial confinement that have elapsed following expiration of the last ordered term of commitment."[7] (*Id.* at p. 406.)

In conclusion, we emphasized, "The ultimate responsibility for bringing a person to trial on an SVP petition at a 'meaningful time' rests with the government. [Litmon's] fundamental liberty interest outweighed the state's countervailing interests in postponement of the trial set for January 2007. The approximate two-month delay of retrial until March 2007, although only incremental, meant the cumulative loss of a whole year in custody after mistrial. 'Time is an irretrievable commodity. . . . [T]ime once past can never be recovered.' [Citation.] Under our country's long-standing jurisprudence, a

[7] In *Barker, supra,* 407 U.S. 514, the court explained that prejudice is assessed in the light of a defendant's interests in avoiding oppressive pretrial incarceration, minimizing the anxiety and concern that can accompany pretrial status, and limiting the impairment to the defense that can arise from the passage of time. (*Id.* at p. 532.)

person has a right to liberty that a government may not abridge without due process. If the constitutional right to procedural due process is not to be an empty concept in the context of involuntary SVP commitment proceedings, it cannot be dispensed with so easily." (*Litmon, supra*, 162 Cal.App.4th at p. 406.)

Discussion

In this case, after defendant's scheduled parole release date of April 27, 2007, he was held in custody until trial commenced on October 6, 2008. Although an extension of custody beyond the scheduled release based on the initiation of an SVP proceeding and later a finding of probable cause is statutorily authorized, here the postdeprivation, pretrial period lasted almost a year and a half. That period may be shorter than that in *Litmon*, but it nevertheless is a substantial amount of time to spend in custody and constituted a substantial loss of liberty that, as we said in *Litmon*, was irretrievable regardless of the outcome of the SVP trial.

Next, the consequences of an erroneous SVP determination were heightened in Litmon because the jury hung after the first trial on a consolidated petition. We note, however, that a jury had previously declared Litmon to be an SVP. Here, the risk of an erroneous SVP determination was heightened because defendant had never been declared an SVP by a jury. Furthermore, while the overall pretrial period in *Litmon* was longer than that here, the determinative period of delay in *Litmon* was caused by a two-month continuance of trial. Here, after more than a year of pretrial delay, the court continued trial for four months.

We further observe that it took over six months after the filing of the petition for the court to conduct a probable cause hearing. The record does not reveal the reasons for this period of delay. Nor does the record reveal the reasons for the nearly five-month delay between the finding of probable cause and the first scheduled trial date on April 21, 2008. Defendant acknowledges some responsibility for the five-week delay from April 21 to June 2 because of the continuance granted due to his belated designation

of Nixon as an expert witness. However, that five weeks of delay are attributable to him does not substantially ameliorate the overall impact of his lengthy pretrial custody and loss of liberty until October 2008.

The record reveals that the parties appeared ready to proceed on June 2. However, a few days before trial, Judge Duncan said he was unavailable because he had another case to try. Defendant asserted his right to a trial within a meaningful time by asking that the case be reassigned. The presiding judge declined to do so, citing a lack of resources to commence trial on June 2, in that all of the courts were occupied with criminal cases. The presiding judge also rejected defense counsel's suggestion that the case trail so that the parties could take advantage of the current availability of witnesses and proceed as soon as a court became available. Instead, he simply vacated the June 2 trial date and remanded the matter for a new trial setting date before Judge Duncan.

As noted in *Litmon*, the state has the ultimate responsibility for commencing trial within a meaningful time. Delay due to systemic problems such as "insufficient judges or facilities to handle overcrowded trial dockets" are outside the defendant's control and thus may be factored against the state. (*Litmon, supra*, 162 Cal.App.4th at p. 403, fn. omitted.) Moreover, having the case trail other matters appears to have been a reasonable option to minimize further delay and accommodate defendant's due process rights. Vacating the trial date, on the other hand, in effect, made defendant get back in line for a new trial date before Judge Duncan and, in our view, reflected the sort of "business as usual" approach to SVP trial that we faulted in *Litmon*.

After the June 2 date was vacated, the trial was rescheduled to August 25, when both parties represented that their witnesses would be available. However, the prosecutor did so without knowing whether all of her witnesses would be available and ultimately misspoke because her key witness would not be available for a couple of months. At that point, defense counsel sought to advance the date to August 11. The prosecutor did not object or otherwise suggest that her witnesses would not be available on that earlier day.

Judge Duncan did not ask the prosecutor, and he rejected that day because he was unavailable. He also rejected defendant's request for a reassignment and reset the trial for four months later in October to accommodate the prosecutor's witnesses.

We reiterate that routine scheduling problems related to witness availability are not matters within the state's control and do not necessarily factor against it. However, the lack of available courts or the unavailability of an assigned judge due, for example, to summer vacation schedules, are not matters within defendant's control and may factor against the state. In our view, moreover, Judge Duncan's unavailability and refusal to consider reassignment so that trial could conceivably commence on August 11 neither outweigh the defendant's due process rights nor justify the defendant's continued pretrial loss of liberty, which, by June 11, when trial was reset to October, had already lasted well over a year.

Finally, we point out that by June 11, the defendant had twice asserted his due process right to be tried in a meaningful time. It is true that defendant did not formally move to dismiss the petition, as Litmon had done. However, defense counsel did assert defendant's rights, he cited *Litmon* and defendant's right to due process, and he requested measures that could have minimized defendant's period of pretrial custody. Since these lesser remedial suggestions were rejected, we consider it unlikely that defense counsel would have succeeded with a motion to dismiss. Thus, the failure to formally seek dismissal does not, in our view, prevent defendant from claiming a due process violation on appeal. The Attorney General does not argue that it should.

In *Litmon*, we concluded that predeprivation trials should be the norm in SVP cases and opined that postdeprivation trials were tolerable in extraordinary cases. At some point, however, the pretrial loss of liberty can cause a denial of due process. Here, the risk of an erroneous determination, defendant's assertion of his due process right to trial, the overall length of the pretrial delay, the irretrievable loss of liberty, and the systemic reasons for much of the pretrial delay, especially the critical four-month delay

after June 2, lead us to conclude that defendant was denied his right to procedural due process.

We recognize that criminal cases generally are entitled to priority over civil matters (see Pen. Code, § 1050, subd. (a)), and SVP cases are considered civil matters. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1192.) Nevertheless, we believe that a defendant in custody awaiting an SVP trial is no less entitled to priority and a timely trial than a criminal defendant in custody awaiting trial. Although an SVP commitment is not punishment for purposes of certain constitutional guarantees and protections (e.g., *People v. McKee* (2010) 47 Cal.4th 1172, 1193-1195 [SVP commitment not punishment for purposes of constitutional protection against double jeopardy]), a defendant in custody awaiting an SVP trial has the same fundamental interest in liberty as a defendant in custody awaiting a criminal trial, and the loss of liberty suffered by both due to a lengthy pretrial delay is, in our view, indistinguishable.

IV. DISPOSITION[8]

The order committing defendant to an indeterminate term as an SVP is reversed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.

[8] Given our conclusion, we need not address defendant's other appellate claims.